

Garneau



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eagle Bob Tail Tractors, Inc.--
Reconsideration

File: B-232346.5

Date: March 30, 1989

DIGEST

Where protester requests that reconsideration--dismissed because lawsuit brought issues before court of competent jurisdiction--be reopened because the lawsuit was dismissed without prejudice the day before the General Accounting Office dismissal, but record shows that suit was dismissed due to uncontested award to another offeror that had proposed a lower cost, but initially had been rejected as nonresponsible, dismissal of reconsideration remains proper; protester is no longer an interested party with standing to protest its rejection as nonresponsible since protester no longer would be in line for award if its protest were sustained.

DECISION

Eagle Bob Tail Tractors, Inc. asks that we reopen its request for reconsideration of our decision Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5, in which we denied its protest, under Department of the Air Force request for proposals (RFP) No. F09603-86-R-1321, that the agency's reexamination of the firm's nonresponsibility should have been referred to the Small Business Administration (SBA). Our January 25 dismissal of the firm's reconsideration request was prompted by the protester's filing of a suit in the United States District Court for the Eastern District of Michigan, seeking review of the same issue; our Office will not consider matters before a court of competent jurisdiction where, as here, the court does not request our decision. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1988).

We deny the request.

Eagle's original protest centered around the Air Force's reconsidering the firm's responsibility after initially

finding Eagle nonresponsible and then referring the matter to SBA (Eagle is a small business) for a final responsibility determination. SBA denied Eagle a certificate of competency (COC), allowing the agency's negative responsibility determination to stand, but the Air Force then agreed, prior to award to another firm, to review new information Eagle presented as establishing its responsibility. The Air Force found that the new information did not warrant reversing its and SBA's negative determinations. Eagle protested that this constituted a new determination that had to be referred to SBA for another COC review, but we held that the Air Force had merely affirmed its prior determination, and that there was no requirement that this affirmation be resubmitted for review by SBA.

In its request for reconsideration, Eagle argued that our decision was incorrect because it was based on (1) the erroneous conclusion that the Air Force's second review of Eagle's responsibility was only an affirmation of the prior finding rather than a new negative determination; and (2) an erroneous reading of the legislative history of the Small Business Act, 15 U.S.C. § 637(b) (1982), as not requiring referral of this second responsibility review to SBA for a second COC review. Eagle also stated in its request, however, that it had filed suit seeking judicial review of this matter in the District Court. We therefore dismissed the request pursuant to our Regulations. 4 C.F.R. § 21.9(a).


In now asking that we reopen its request for reconsideration, Eagle asserts that the January 25 dismissal was improper because, although unbeknownst to our Office, Eagle had stipulated to a dismissal of its District Court action, without prejudice, on January 24.

Whether or not our dismissal for the ground stated in our notice remains appropriate, it is clear from Eagle's submission here that the firm's reconsideration is not for review by our Office. In this regard, the District Court order dismissing Eagle's lawsuit indicates that the reason for the dismissal was the Air Force's award of a contract to P.S.I. International. The record in Eagle's original protest showed that P.S.I. had been the low offeror in line for award until the firm was rejected as nonresponsible. As did Eagle, P.S.I. presented the Air Force with new information the firm believed was sufficient to warrant overturning the nonresponsibility determination. As of the time we were considering Eagle's protest, the Air Force had declined to review P.S.I.'s responsibility again, but the agency thereafter relented and, as evidenced by the award, proceeded to find P.S.I. responsible.

To be eligible to pursue a protest, a protester must be an interested party within the meaning of our Regulations, i.e., an actual or prospective offeror whose direct economic interest would be affected by the award of or failure to award a contract. 4 C.F.R. §§ 21.0(a) and 21.1(a). Where the protester is not the low offeror, and thus would not be in line for the award if the protest challenging its rejection as nonresponsible were sustained, the protester lacks the interest necessary to qualify as an interested party. See Asbestos Abatement of America, Inc.--Request for Reconsideration, B-221891.2, B-221892.2, Aug. 5, 1986, 86-2 CPD ¶ 146.

Since P.S.I., not Eagle, ultimately was in line for the award here, and Eagle does not question the propriety of the award to P.S.I., Eagle would not receive the award even if it were found to be responsible, and thus is not an interested party with standing to pursue reconsideration of our original decision. While Eagle was interested based on the record in its original protest, that interest no longer exists now that award properly has been made to P.S.I. Asbestos Abatement of America, Inc.--Request for Reconsideration, B-221891.2, B-221892.2, supra.

The request for reconsideration of the January 25 dismissal is denied.


James F. Hinchman
General Counsel